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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY, *Appellant*,

vs.

RAILROAD COMMISSION OF KENTUCKY ET AL., *Appellees*.

MOTION OF MOVANTS ET AL. TO QUASH CITATION AND DISMISS APPEAL, WITH ALTERNATIVE AND BRIEF

An Appeal from the District Court of the United States for the Eastern District of Kentucky

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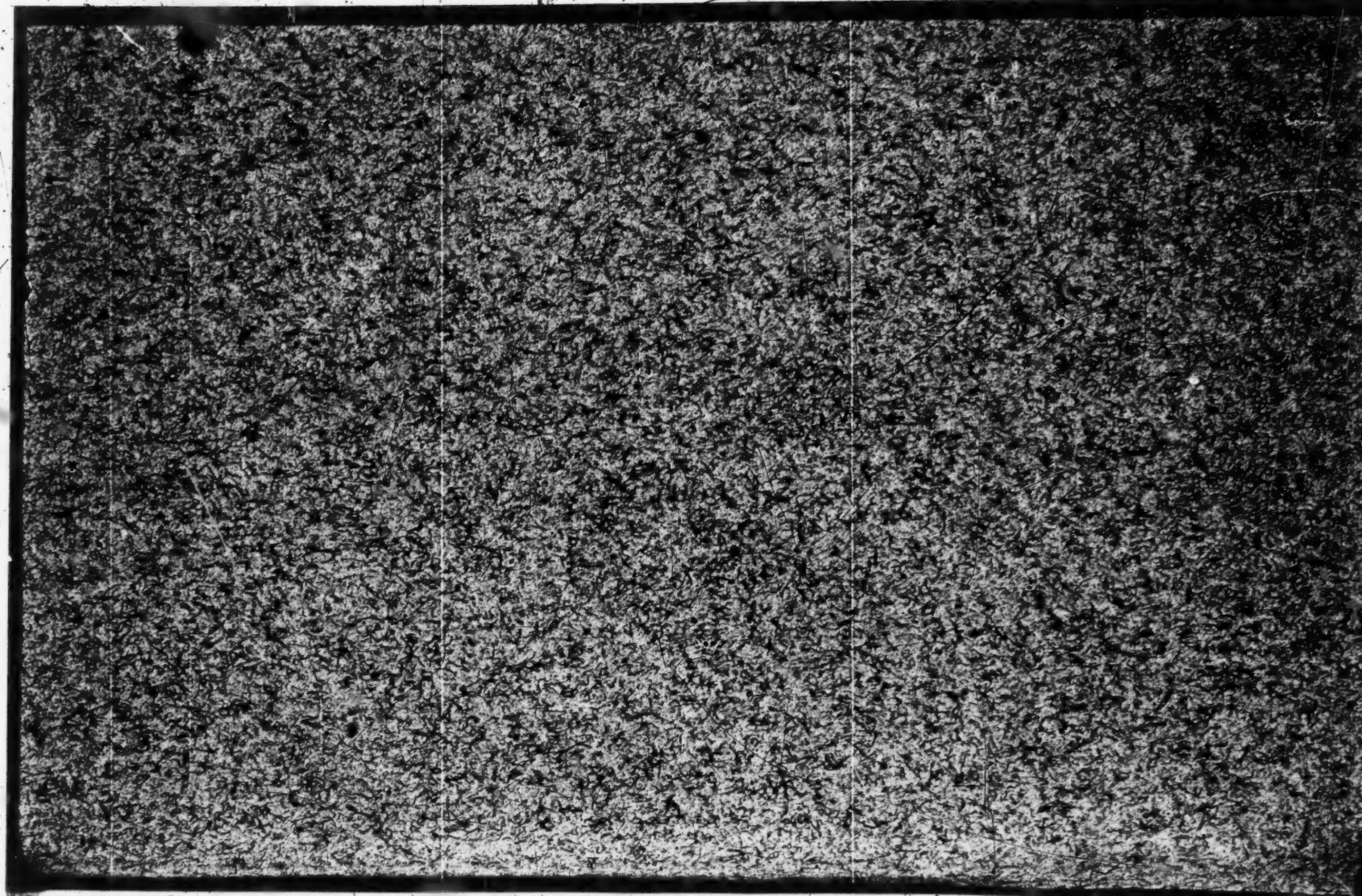

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

v.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION ET AL.,
Appellees.

MOTION OF APPELLEES, MRS. GEORGE HIGNIGHT, MRS. WELLINGTON PAYNE, MRS. ANNA MAE HOLLINGER, MRS. GLADYS BERKLEY, J. W. DELPH, STANLEY DEARBORN, WILLIAM DEARBORN, P. P. O'NEILL, MRS. MARGARET TAYLOR, R. T. CHILDERS, NANCY BELL HENDERSON, AND H. E. STEVENS, APPEARING SPECIALLY, TO DISMISS THE PRETENDED APPEAL AS TO THEM, AND QUASH THE CITATION ISSUED AGAINST THEM, WITH AFFIDAVITS AND BRIEF

Come now the above named appellees, appearing specially for the purpose of this Motion and this Motion only, and move this Honorable Court to quash the pretended citation issued out of the United States District Court for the Eastern District of Kentucky, on the 19th day of May, 1933,

and to dismiss the pretended appeal as against these moving appellees for the following reasons, to wit:

1. No Notice of Appeal has been given to these said appellees, nor has any order allowing an appeal as to them been made and entered in this cause.
2. There has been no amendment made to the appellate proceedings in this Court.
3. These appellees were not inadvertently omitted from the original appellate proceedings taken in this case, but their omission was deliberate, and upon the theory that a judgment against defendant, Featherstone, would have bound these appellees.
4. That the omission of these appellees was deliberate and intentional.
5. That the limitation within which an appeal can be perfected from the judgment of the United States District Court for the Eastern District of Kentucky so entered in this cause has expired long before the issuance of the citation in this case or the pretended amendment of appeal.
6. That this case does not present a situation where the appellant is allowed to amend his appeal.

Wherefore, said appellees pray that the citation so issued as aforesaid be quashed, vacated, and set aside; and that the pretended appeal be dismissed as to them for the reasons herein set out.

Affidavits and other evidence will be submitted with this Motion in support thereof.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,

Attorneys for Appellees.

To Counsel for the Appellants and Appellees:

Take notice that the following named parties, Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson, and H. E. Stevens, appearing specially, to dismiss the pretended appeal as to them, and quash the citation issued against them, will, on the ..... day of September, 1933, file in the above entitled cause in court their Motion to quash the citation and dismiss the pretended appeal, a copy of which Motion is attached hereto and that said Motion will be presented and called to the attention of the Court on Monday, October 2, 1933.

Affidavits and other evidence will be used in support of this Motion.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
(409-10 Peoples Life Ins. Bldg.)

Attorneys for the Appellees.

Statement of the Case

This cause was set for oral argument on the 9th of May, 1933, but these movants brought to the attention of this Court by motion to dismiss this appeal, with affidavits, the facts that they were parties to the ligitation in the District Court, has not been made parties to this appeal and were necessary parties to it.

They submitted for the Court's inspection and examination, exemplified copy of the Petition of Mrs. Hignight and the other movants and some four hundred other persons presented to the Franklin Circuit Court, seeking a mandamus against the Kentucky Railroad Commission to compel

it, to assume jurisdiction for the various gas controversies, including all of the litigants, and the Central Kentucky Natural Gas Company, appellant here, and the judgment of that Court granting the writ.

They presented to this Court the certified record of the pleadings, orders, hearings, testimony and award made to them by the Kentucky Railroad Commission, disclosing to this Court that as to these movants and some forty two hundred other persons, no injunctive relief had been prosecuted against them by appellant. They also presented to the Court for it inspection certified copies of numerous proceedings had in the District Court of the United States by, and affecting, these movants, which are not in the printed record in this Court. They present with their affidavits at this time data on extensive litigation projected by them in the State and District Court, seeking to effectuate the award of the Railroad Commission, as it was sustained by the District Court, which litigation has been submitted and parties are awaiting decisions.

On an inspection of these records, this Court on May 9, 1933, declared these movants to have been parties in the lower Court and necessary parties to this appeal. The argument on the merits was continued to October 9, 1933, to give the appellant an opportunity to adopt appropriate procedure if any is available to remedy this lack of parties.

Appellants, on May 17, 1933, sued out of the District Court, and served an alias citation (R. 275), but it did not petition for an appeal against these movants; it did not file any designation of record, it did not bring up or print the omitted and necessary portions of the record mentioned above.

The affidavits filed in support of the movants' present motion to quash the citation, show that the City of Lexington, Kentucky, is governed by the Commissioned form of Government.

This form of Government includes the initiative by which the citizenry may initiate desired legislation and the right of referendum under which obnoxious legislation may be vetoed by the popular will. Appellants failed to comply with Rules 10 and 13 of this Court.

This affidavit shows that Section 37 (R. 38) was placed in the present franchise to give to the citizenry a representation in gas rate controversies, separate and apart from, and independent of the city officials.

The desire of the citizens to represent themselves in their own right, has been justified by subsequent events. The failure of the City of Lexington heretofore to move this Court to dismiss appellant's appeal alone tends to justify the distrust in which they held their officials in connection with the Gas rate litigation.

The franchise (R. 31), as a result of the activities of these movants, is a tripartite instrument. The parties are:

1. The consumers, real parties in interest.
2. The Gas Company, a real party in interest.
3. The City of Lexington, a merely nominal party, by reason of having enacted the franchise.

The Railroad Commission award was made on the 9th day of October, 1928 (R. 12). It was suspended thirty days for further procedure in that tribunal. No appeal was attempted against movants. No injunctive relief was sought against movants.

BRIEF

Point I. Appeals Which Are Defective Because of Lack of Necessary Parties Can Be Remedied Only by Timely Amendment in This Court and Then Only When the Necessary Data Appears in the Record in This Court.

By the memorandum opinion of May 9, 1933, this Court, after declaring that the applicants were parties in the Court below and necessary parties here, passed the argument

of the case on the merits to give to the appellants upon
tunity to take such action as proper procedure might indi-
cate advisable with regard to the omission of these movants
as appellees. The order of this Court did not make these
movants appellees, or indicate that they could now properly
be made so. As to procedure, the appellant was left to
pursue its own course, if any there was open to it, under
the provisions of the Federal Statute and the rules and
decisions of this Court. The Gas Company was pleased to
term this order a Mandate to somebody, somewhere, some-
how, to make the consumers parties. The consumers or
movants are satisfied sufficiently not to appeal the decree
of the District Court. They are satisfied with the award
of the Railroad Commission. They had nothing to appeal
from. No reason exists for them to cause themselves to
be impleaded in this Court; they are only seeking to dis-
miss an invalid appeal, and to obstruct and prevent a too
late, untimely and irregular effort to validate the appeal
in the two lower tribunals, they litigated as independent
parties, representing independent rights within themselves.
They believe the time for an appeal has passed. There
seems to be no rule of equity, appellate procedure, or statu-
tory provision, under which the benefits of the decree of
the lower court or the award of the Railroad Commission
can now be taken from them.

As to those of the Intervenors in the Railroad Commis-
sion, who intervened and became parties in the District
Court, no appeal was prosecuted by the appellant, no order
of appeal asked for them, no appeal bond executed, and the
notice of appeal likewise, ran only to the appellant gas com-
pany. No application was ever made to this Court for
leave to implead them. This Court does not amend writs
on its own motion, but only when timely application is made
for leave to amend.

In Sidney W. Sea v. Connecticut Mutual Life Insurance
Company, 184 U. S. 690, 22 L. Ed. 772, the court had before

it, a defective record, but one subject to amendment under Section 1006, Rev. Stat., now 873 U. S. C. A. This Court said:

> "The defect is one that is amendable under section 1006 R. S. but as no application is made by the plaintiff in error for leave to amend, and no citation has ever been served, and we are not inclined, on our motion, to make any order in that behalf."

Without asking this Court for leave to amend this record, appellant appeared in the District Court on the 17th day of May, 1933, practically eight months after the decree appealed from had been entered, and procured a citation against these movants. Upon the hearing of the application for this citation, Judge Hickenlooper indicated to the appellant, that the District Court was without jurisdiction because the *supersedeas* and appeal had removed the record from that Court to this Court. He indicated the view that the Supreme Court of the United States alone could authorize the issue of a citation in the case; however, the appellant procured the citation from the District Court and that citation is the sole step which it has taken to amend this record, or to implead the movants. The Counsel believe and submit to this Court that Judge Hickenlooper's suggestion is the law of this case; that the District Court was without jurisdiction to issue the citation in the case. It would appear from a reading of the case that only this Court has power to amend the record once it is removed into it. Having failed in its plan to eliminate further contest with the movants by selecting as their champion a David of their own creation, and having failed in the attempted imposition it seeks to remedy its plight by bringing itself within the purview of Section 873, Title 28, U. S. C. A., formerly 1005 Rev. St. The jurisdiction of this Court in the premises is prescribed and limited by that section which

provides for amendment or correction of the record in five circumstances only:

1. Where there is a mistake in the teste of the writ.
2. Or a seal to the writ wanting.
3. When the writ is made returnable on a day other than the commencement of the next then ensuing term.
4. Or when the statement of the title of the action or parties thereto in the writ is defective, and finally if the defect can be remedied by reference to the accompanying record.
5. Provided the defect has not prejudiced and the amendment will not harm the defendant.

This proceeding would project on the theory that the award of the Railroad Commission and the decree of the District Court became final upon the expiration of the statutory time for an appeal to this Court. The appellant does not bring its case within Section 873. It adopts a novel expedient. It procures a mere citation as a substitute for a perfected appeal. It substitutes this citation for the petition for appeal, for its assignment of error, for its order of appeal, and for its appeal bond. Section 873, U. S. C. A., was not enacted to be used to create jurisdiction. It was enacted to aid jurisdiction only. It is well said by the Cyc. of Federal Procedure, Section 289, that a citation cannot be issued to create jurisdiction by bringing in omitted parties essential to the appeal. See Kidder v. Fidelity Insurance Co., etc., 105 Fed. 821, and Hudson v. Limestone Natural Gas Company, 144 Fed. 952.

Section 873, *supra*, does not seem to give this Court the jurisdiction to amend the record by bringing into it, or making appellees of, movants, because the record accompanying the appellants' appeal does not show that the movants named in the citation were in anywise connected with the litigation in the Court below. Appellants prepared these records, and deliberately as part of their plan of

procedure eliminated all the proceedings filed by the movants in the lower Court and the Railroad Commission and all reference to them in or on the orders taken in that Court and Commission.

The appellee, City of Lexington, whether purposely or coincidentally, likewise, carefully abstained from making use of, or bringing up, any part of the record that we have disclosed to this Court, and participation of these movants in the Court below. The appellee might well have included in its record the intervening petition of the movants, their motion to dismiss or set aside the order overruling their motion, and various other steps involving their participation on such a record; and might have moved effectively to dismiss appellants' appeal and protected all rights of the citizenry of Lexington under the award of the Railroad Commission and the decree of the District Court refusing to enjoin that award.

In each case cited in this section of the Brief it will be observed that the defect was remedied by an inspection of the accompanying record.

In Knickerbocker Life Insurance Company v. P. H. Pendleton *et al.*, 115 U. S. 339 340, 29 L. Ed. 432, a motion was made to amend the appeal. The citation was directed against only one of the plaintiffs, P. H. Pendlton. Preliminary appeal bond was made to him alone, but the bond for the *supersedeas*, subsequently executed, was made to all the plaintiffs by name. Discussing that case, the Court said:

> "The writ of error in this case was brought to reverse this judgment, and a judgment of reversal was pronounced on the 5th of January last. It was subsequently discovered by the Court (a fact not noticed by any of the Counsel) that the writ of error was sued out and the citation was directed and served against only one of the plaintiffs below, to wit, P. H. Pendleton. The preliminary appeal bond for costs was also made to P. H. Pendleton alone; but the bond for super-

> sedeas, subsequently executed, was made to all the plaintiffs, and the subsequent proceedings were generally entitled in the name of P. H. Pendleton et al. This Court, in view of the defect in the writ of error, entered a rule on the plaintiff in error, to show cause why the judgment previously entered should not be vacated and the writ of error dismissed."

The rule was discharged.

In Carlisle Mason *et al.* v. United States, 236 U. S. 381 386, 34 L. Ed. 545, argued by Judge Taft, while Solicitor General of the United States, judgment was rendered in favor of the United States against a postmaster and five sureties. Two of the sureties appealed. All parties to the record in the lower Court were not parties to the appeal Appellant asked leave to amend the writ of error, the citation and the appeal bond. This motion was joined by *all the omitted parties entering their appearance and consenting to the amendment.* They further moved as an alternative remedy for their plight, that this Court permit a judgment of severance and that the omitted parties be made defendants. The time for appeal as to the omitted parties had passed. The points stressed by Judge Taft in his brief was sustained and the court order was:

> "Motion for leave to amend the writ of error, citation and bond, denied. Writ of error dismissed."

There was lack of jurisdiction, as there is in the case at bar.

In Rininger v. Puget Sound Electric R. R. Co. *et al.*, 220 Fed. 419 (9 C. C. A.). Suit by Rininger against the Electric Company and Traction Company for death of father. At trial directed verdict was given the Traction Company. Trial resulted in verdict for Light Company. Rininger appealed only against the Light Company. The Traction Company was not named in the writ of error, or in any way made a party to the proceeding. A motion was made to dis-

miss because of this defect of parties. Appellant met this motion by asking leave of the appellate court for permission to amend the writ of error and the citation, and to substitute for the original appeal bond a new and amended bond to conform to the amended writ of error on the ground that it was inadvertently omitted. The motion to amend was granted. The error could only be corrected from the accompanying record.

The leading case on the subject of amendment is probably Estis v. Trabue *et al.*, 128 U. S. 225-230; 32 L. Ed. 437. The Court held as reported in the 1st, and 4th *syllabi*:

> "1. This Court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the expression '& Co.' or the expression 'and others' or in any other way than by their individual names.
>
> 2. But where the record discloses the names of the individuals who compose the firm, the writ of error can be amended by this Court, under section 1005 of the Rev. Statutes, Sec. 3, Act of June 1, 1872 (chap. 255, 17 Stat. at L. 196); provided the defect has not prejudiced and the amendment will not injure the defendant in error.
>
> 4. Where there is a substantial defect in the writ of error, which this Court cannot amend, it has no jurisdiction to try the case. It will then, of its own motion, dismiss the case without awaiting the action of a party."

The amendment was allowed as the individual name appeared affirmatively in the record in this Court.

In Thomas *et al.* v. Green County, a Kentucky case (6 C. C. A.), 146 Fed. 969, opinion by Judge Lurton, the record was defective. A motion to dismiss was made because of this defect. The Plaintiffs in error met the motion to dismiss the appeal not from a mere citation from a court deprived of jurisdiction by appeal, but by timely application to the Appellate Court for leave to amend the writ and citation by inserting in each the names of the omitted

parties below, and by motion to amend the appeal bond or to give another bond. The defect of parties was the result of mistake. An examination of the accompanying record showed the names of the parties and the amendment was permitted. In discussing the case, Judge Carlton said:

"The right to amend the writ of error and citation by adding omitted plaintiffs, depends primarily upon whether the record shows enough to authorize the amendment under Section 1005, Rev. Stat. (U. S. Comp. Stat. 1901, p. 711), Batts v. Prahm, 120 U. S. 220, 9 Sup. Ct. 50, 32 L. Ed. 637; Walton v. Marietta Chair Co., 157 U. S. 342, 15 Sup. Ct. 630, 39 L. Ed. 725. Thus, in Batts v. Prahm, the plaintiffs in error, as well as the defendants in error, were described only by the names of firms. The record disclosed the names composing the firms, and an amendment inserting their names was allowed. In Walton v. Marietta Chair Company, the plaintiff in error was described as administrator of a certain estate. The accompanying record showed that another person named therein, claimed to have succeeded the person named as administrator, and that this other had tendered the bill of exceptions and given bond to prosecute the writ of error. The substitution was allowed. In Knickerbocker Life Insurance Company v. Pendleton et al., 115 U. S. 339, 6 Sup. Ct. 71, 29 L. Ed. 410, the Supreme Court, after final judgment discovered that the writ of error was sued out and citation directed and served against P. H. Pendleton, only one of the plaintiffs below; that the appeal bond was made to him alone, but that supersedeas bond ran to all of the plaintiffs below, and that all subsequent proceedings were entitled in the name of P. H. Pendleton et al. After notice to Plaintiff to show cause, the Court allowed the writ of error to be amended, set aside the judgment, ordered a new citation to all the plaintiffs below, and when same was served, allowed a re-argument.

The test of the right to amend when some of the plaintiffs are not joined in a writ of error seems from the case cited to turn upon whether the omission to join them appears from the record to have been accidental."

In Credit Company v. The Arkansas Central Railway Company *et al.*, 128 U. S. 258 261, 32 L. Ed. 448, the final judgment was entered January 22, 1883. An appeal was prayed and allowed. No bond was given and no citation issued and no return of the record was made to the ensuing term of the court. The appeal lapsed on January 22, 1885. Two years after the entry of the decree, a petition for an appeal was presented by the Solicitor of the Complainant to Mr. Justice Miller of this Court and the appeal was allowed by him. At the same time, the Justice signed the citation to the Defendants to appear in the Supreme Court. A bond for costs was likewise approved by the Justice. These papers were not presented to the Circuit Clerk, nor filed with the Clerk thereof until the 27th day of January, 1885, five days after the term of office expired. In discussing that case, Mr. Justice Bradley said:

> "The attempt made in this case to anticipate the actual time of presenting and filing the appeal, by entering an order nunc pro tunc, does not help the case. When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

The cases hold that this Court fails to obtain jurisdiction if the record fails to give data on which to amend.

It will be noted in the case at bar that no effort was made to procure a citation even from the District Court, until seven months and twenty seven days had elapsed.

In Mary Ellen Hardee *et al.* v. Benjamin J. Wilson, 146 U. S. 179 183, 143 L. Ed. 933, the decree of the lower court declared a deed affecting appellant Hardee and Minor and his wife to be void. From the decree, Hardee alone appealed. The court enunciated the doctrine of joinder of all of the parties in the following language:

"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. Owings v. Kincannon, 32 U. S. 7 Pet. 399 (8:727), Mussina v. Cavazos, 73 U. S. 6 Wall 355 (18:810).

This court reviewed the authorities and dismissed the appeal because Minor and his wife jointly interested with appellant, had not appealed and summons and severance had not been made.

In Sipperley *et al.* v. Smith *et al.*, 155 U. S. 86, 39 L. Ed. 79, the intervenor prosecuted an appeal from judgment of the lower court without joining the other parties to the suit in the appeal and without an order, permitting a severance. The title of the cause in the District Court as it appeared in the record was John O. Smith *et al.* v. A. F. Sipperley *et al.*, and M. J. Gray, Mrs. A. F. Sipperley, Mrs. E. J. Walling and H. S. Lee and the Union Bank, intervenors. The title to the judgment in the lower court followed the title in the caption to the proceeding. The record disclosed a bond dated December 22, 1893, entitled John O. Smith *et al.*, Respondents, v. A. F. Sipperley *et al.*, Defendants, and M. G. Gray *et al.*, Appellants, signed by Mrs. A. F. Sipperley, Mrs. A. J. Wallings, H. S. Lee, and the Union Bank, as principals, running to John O. Smith, George Whiting, Chas. P. Connor and G. S. Smith, composing the firm of Smith, Whiting, Connor and Company. The defendant, M. J. Gray, was omitted from this bond and from the appeal. The bond was approved by the Chief Justice of Utah. Citation was issued, dated January 4, 1894, directed to the defendants and their attorneys. The appellee moved to dismiss the appeal for want of parties or to affirm it. No application was made to the Supreme Court either for a severance or an amendment. The Supreme Court, commenting on this, said:

"No application for summons and severance as to M. J. Gray or any equivalent therefor appeared in the

> record, nor any order permitting severance; *nor was any application made in this court for the issue of citation* to A. F. Sipperley and H. S. Lee, *or leave to perfect the appeal as to them;* nor did they or Gray appear herein. Appellees moved to dismiss or affirm."

The appeal was dismissed.

This case holds that leave to amend a record pending in this Court must be made to this Court. In the case at bar, the citation was issued and the bond was not amended by the lower court, after it had lost control of the case by the appeal.

In P. P. Mast & Company v. Superior Drill Company, 154 Fed. 45 (6 C. C. A.), before Judges Lurton, Severens, and Richards, an amended assignment of errors was filed with the Clerk of Court some five days after the appeal had been taken. The court said:

> "The assignment of errors is to be filed in the court below before the court loses jurisdiction, and is a necessary condition to the allowance of the appeal and the transfer of the jurisdiction to the Court of Appeals."

Counsel find no case where an appealed record has been amended without an order or allowance for the amendment by the appellate court.

United States v. Hooe *et al.*, 1 Cranch, C. C. 116, 26 Fed. 369, held:

> "After a writ of error has been served and returned to the Supreme Court, the record is no longer before the court below and cannot be amended, although at an adjourned session of the same term, it appears that the writ of error has been dismissed in the court above at the request of the party praying an amendment."

(Affirmed in 3 Cranch (7 U. S.) 73.)

In the case of Sipperley *et al.* v. Smith *et al.*, 155 U. S.

84-87, *supra*, the appeal was dismissed because all parties to the record were not included in the appeal. The Chief Justice in passing on the motion, said:

> "The motion to dismiss is sustained upon the authority of Masterson v. Howard, 77 U. S. 10 Wall., 416 (19:953); Hardee v. Wilson, 146 U. S. 179 (36:933); Inglehart v. Stansbury, 151 U. S. 68 (38:76); Davis v. Mercantile Trust Co., 152 U. S. 590 (38:563). Appeal dismissed."

In Chas. D. Newton v. Consolidated Gas Company of New York, 265 U. S. 78, 80, 81, 68 L. Ed. 909, the court dismissed the appeal for want of jurisdiction because the utility company was not impleaded in the appeal. In making this order of dismissal, this Court said:

> "From the final decree of the district court fixing the costs, an appeal was taken to this court. To that appeal the Public Service Commission of New York, was defendant in the suit and was not made a party and no summons and severance was issued against it. Accordingly the appeal was dismissed in the following per curiam:
>
> Dismissed for want of jurisdiction upon authority of Masterson v. Herndon (Masterson v. Howard), 10 Wall 416, 19 L. Ed. 953; Hardee v. Wilson, 146 U. S. 179, 180, 36 L. Ed. 933; 13 Sup. Court Reports 39; Sipperley v. Smith, 13 Sup. Court Reports 39; Sipperley v. Smith, 155 U. S. 86, 89, 39 L. Ed. 79, 80, 15 Sup. Ct. Reports 15; Moytin v. Vela, 216 U. S. 598, 601, 54 L. Ed. 632, 634, 30 Sup. Ct. Rep. 439."

Upon the petition for rehearing, the appellants brought to the knowledge of the court information that the utility commission had been dissolved, and thereupon the order of dismissal was set aside.

In Branch T. Masterson, Assignee of John H. Herndon v. Volney E. Howard *et al.*, 77 U. S. (10 Wall) 416-418; 19 L. Ed. 953, a decree was entered in favor of Howard v.

Maverick and Herndon. Herndon prosecuted the appeal and stated therein that his co-defendant, Maverick, refused to prosecute the appeal with him. It was a joint decree against the two defendants. In discussing the case, the Supreme Court said:

> "It is objected by the appellee, that there is no valid appeal in this case, because the decree being a joint decree against Herndon and Maverick, Herndon alone has asked for an appeal.
>
> A careful examination of the record satisfies us that the decree is a joint decree, and the appeal is clearly taken by Herndon alone.
>
> It is the established doctrine of this Court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered, must join in the appeal, or they will be dismissed. There are two reasons for this; 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. Williams v. Bk. of U. S., 11 Wheat. 414; Owings v. Kincannon, 7 Pet. 399; Wilson v. Insurance Co., 12 Pet. 140. * * *
>
> We dismiss this appeal with the less regret as there is still time to obtain another on proceedings not liable to the objection taken to this. It is ordered accordingly, that this appeal be dismissed."

Lamon *et al.* v. Speer Hardware Co., 190 Fed. 734 (8. C. C. A.), was an action at law by the Speer Hardware Company against W. A. Lamon and J. W. Wallace, partners, as W. A. Lamon & Company. A judgment was given in favor of the Hardware Company. The Defendant appealed. The surety was not joined in the appeal. A motion to dismiss the appeal was granted because of the failure of the appellants to have the sureties joined with them or to pro-

cause a severance. The Court said it must be granted because of the decisions of this Court in Ellis v. Trahue, *supra*, and other cases.

In Ireton *et al.* v. Pennsylvania Co., 185 Fed. 84 (6 C. C. A.), the writ of error was sued out by the Plaintiff and one Defendant to review a judgment for the principal defendant. No summons and severance was had for the other defendants. The Court held that the writ of error could not be sustained in the absence of the other party.

Point II. Courts Are Without Power or Jurisdiction to Extend or Enlarge Time Limits Fixed by Statute to Perfect Appeals.

In Camden Iron Works Co. *et al.* v. Slater, District Judge, 223 Fed. 611 (6 C. C. A.), it appeared in the proceeding that the appellate procedure had been protracted, awaiting a settlement of a bill of exceptions. The Court had extended the time for the bill of exceptions, until the time for an appeal had passed. When the matter of settling the bill of exceptions came before the District Judge he refused to sign same on the ground that time for the appeal had passed. In discussing that situation, the Court said:

> "It is urged that no writ of error has been taken out, that the time therefor has expired, and that for these reasons bill of exception should not be settled. If the premises are correct the conclusion follows for in such case a bill of exceptions would be futile. No writ of error has ever issued, nor has order therefor been made; and courts have no power to extend the statutory period for taking out the writ. Nor did the pendency of settlement of bill of exceptions have that effect, for there was no legal reason why issue of writ should not precede settlement of bill. Hunnicutt v. Peyton, 102 U. S. 333, 354, 355, 26 L. Ed. 113; Shreve v. Cheesman (8 C. C. A.), 69 Fed. 785, 787 (36 C. C. A. 413)."

In Camden Iron Works v. City of Cincinnati (6 C. C. A.), 241 Fed. 846, from the *syllabi*, we quote:

"Under Act March 3, 1891, c. 517, sec. 11, 26 Stat. 829 (Comp. St. 1916, sec. 1647), requiring a writ of error to be sued out within six months, the six months limitation is jurisdictional and the courts have no power to extend it."

In American Baptist Home Mission Society v. Barnett *et al.*, 26 Fed. (2d) 350, Barnett, an Indian, by contract conveyed property to the American Baptist Home Mission Society and the Equitable Trust Company of New York. The transaction was set aside in a suit by Barnett against the American Baptist Home Mission Society, and the Equitable Trust Company of New York. The American Baptist Home Mission Society alone appealed. In this case they moved to amend. A motion to dismiss for want of proper parties was duly made. The appellee claimed dismissal because the Trust Company was not joined in the appeal and that the time in which an amendment might be applied for and made, had passed. There was no severance of the two defendants. In denying a motion to amend and granting a motion to dismiss, the Court said:

"The federal cases also contain many statements which tend to support the argument that the court acquires no jurisdiction where a necessary party is neither bound nor severed for failure to join. See Estis v. Trabue, supra; Dohm v. Jennings, 139 U. S. 385, 388, 11 Sup. Ct. 584, 35 L. Ed. 217; Fitzpatrick v. Graham, 119 Fed. 353 (2 C. C. A.); Grand Island, etc. Co. v. Sweeney, 103 Fed. 342, 348 (8 C. C. A.); Capron v. Waldron, supra; Dodson v. Fletcher, 79 Fed. 129 (8 C. C. A.)."

In Siegelschiffer v. Penn Mutual Life Insurance Company *et al.*, 248 Fed. 226, the Court said:

"A motion was made to dismiss the writ of error on the ground, among others, that it was not taken within six months after the entry of the judgments sought to

be reviewed. The judgments in the Court below were entered on January 8, 1917. The writ of error was taken on July 9, 1917. The six months' period expired on July 8, 1917, which fell on Sunday. The question is whether the writ taken out on the following Monday was in time.

The question now presented to the Court has been passed upon by the Circuit Court of Appeals in the Eighth and Ninth Circuits. And in both circuits it was held that when the last day of the six month within which an appeal may be taken or writ or error sued out falls on Sunday, the appeal cannot be taken, or writ sued out, on the Monday following. The question was presented in the 8th Circuit in Johnson v. Meyers (1893), 54 Fed. 417, 4 C. C. A. 399. It then arose in the Ninth Circuit in Meyer v. Hot Springs Imp. Co. (1909), 169 Fed. 628, 95 C. C. A. 156."

In Boatmen's Bank v. Atchison, T. and S. F. Ry. Co., 2 Fed. (2d) 972, the time for suing out a writ of error expired on September 4, 1923. The petition for writ of error, assignment of errors and bond were filed October 17 following, but *nunc pro tunc* as of September 4, 1923. An order of appeal was thereupon made upon October 17, but *nunc pro tunc* as of September 4, 1923. A motion to dismiss the appeal was granted.

In Sprague v. Chicago B. & Q. R. R. Co., 17 Fed. (2d) 768, the doctrine in the case is summed up in the first and second *syllabi*, which read:

"Under U. S. Comp. St. sec. 1647, requiring appeal or writ of error to be taken within six months after decree, Circuit Court of Appeals is without jurisdiction to review judgment from which writ of error was not sued out for more than one year."

"Time provided by statute in which an appeal may be taken, or writ of error sued out, after entry of judgment cannot be extended by order of court."

In Priest v. Seaman *et al.*, 266 Fed. 844 (8 C. C. A.), the doctrine as stated in the caption is as follows:

> "To sustain an appeal from an order equally affecting several defendants, all must join in the appeal, or there must be a notice and severance."

In Dodson v. Fletcher, 78 Fed. 214 (8 C. C. A.), the appeal was dismissed because all parties to the judgment were not brought before the Court.

In Nathaniel Lord v. John W. Vensie, 8 Howard 249, 12 L. Ed. 1067, this Court, speaking through Chief Justice Taney, held as stated in the *syllabi:*

> "Where it appears to this court, from affidavits and other evidence filed by persons to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the circuit court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed."

In William A. Freeborn *et al.* v. Ship Protector, 78 U. S. 82, 88, 20 L. Ed. 47, a motion to *dismiss for want of jurisdiction* was based on the fact that the parties were not all named in the writ. Some of them were included in the designation. The procedure adopted was a motion to amend the petition on appeal, citation and bond. Amendment denied and appeal dismiss for *want of jurisdiction*, and the Court said:

> "The opinion of the court in the present case is, that no distinction in respect to the question before us can be made between the case of an appeal under the act of 1803 (2 Stat. at L. 244); and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction,

apply with equal force to the former. This result dis poses of the motions on the part of the appellant to amend the petition of appeal, citation and bond, and also the motion to amend the libel.

The motion to dismiss for want of jurisdiction granted."

In Wilson v. Kissel, 161 U. S. 248, 41 L. Ed. 422, appeal was dismissed because defendants necessary to, and directly interested in, plaintiff's appeal were not summoned and no severance was made, notwithstanding the fact that the omitted defendants in plaintiff's appeal were the ones who had also appealed. Plaintiff's appeal dismissed. This case is cited in Zollinc's Federal Appellate Jur. & Pro., p. 94.

It seems clear that, as held by the Court, on May 9, 1933, necessary parties were not made parties, and also that there was not sufficient data in the record filed by which to amend to name the necessary parties, and that, therefore, this Court has no jurisdiction of this appeal, and it was, and is, beyond the jurisdiction of the lower court to issue an alias citation, it is submitted that the citation should be quashed and the appeal dismissed.

Respectfully submitted,

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,

Attorneys for the Morans.

AFFIDAVIT

Now come the movants, Mrs. George D. Highight, Mrs. Anna Mae Hollinger, Messrs. John W. Hardy, S. W. Dearborn, O. W. Baugh, Joseph W. Delph, and William Dearborn, and being first duly sworn, state as follows:

1. They make this affidavit in support of their Motion to quash the citation filed herein on the fifteenth day of May, 1933.
2. That they are appearing specially before this Court and only for the purpose of said Motion.
3. That they are officers and members of the Gas Consumers League of Lexington, Kentucky, an unincorporated Society of more than six thousand in number, all customers of the appellant Company, and participated in all the proceedings herein named, on behalf of said organization and all other Gas Consumers of the City of Lexington.
4. That at all times during the years 1925 to and including the present time, close complex and strong interlocking conditions have existed between the appellant Gas Company and other power companies in Lexington, and the governmental, political and financial organizations in the said City.
5. The original gas franchise expired in October, 1925. Negotiations between the Company and others concerned, and the officials of the City were held behind closed and locked doors, the public and even newspaper men being excluded therefrom.
6. The citizens and gas consumers believed it necessary for their common welfare to organize, and as far as practicable, to control the granting of the new franchise to the Company.
7. That Wm. H. Townsend was Corporation Counsel of the City and at the same time was General Counsel for the Lexington Utilities Company, the Corporation which then, as now, owned the Gas distribution system in the City of Lexington, through which the appellant then, as now, delivered gas to its consumers; that said Corporation was then, as now receiving 12½% of the gross income of the Central Kentucky Natural

the Company owns, as rental for the distribution system, that said Utility was closely affiliated with and under common ownership with other utilities for which appellant's Counsel, H. P. Duncan, was then, as now, General Counsel.

8 That the gas rate, lower than fifty cents per M cu ft was under discussion by the City officials. They caused a preliminary draft of a lengthy franchise ordinance to be published. The ultimate rate provided was fifty, and, that militant action meetings held by citizens, caused its abandonment.

9 Another franchise was prepared by the City and enacted. This provided for a fifty rate and the pressure required was fixed at two ounces; four ounces being the minimum of efficiency in Lexington for ordinary use. The movants and others invoked the City Charter right of referendum, and upon the receipt of a Petition signed by some twelve thousand and five hundred voters of the City of Lexington, thereupon repealed the Franchise Ordinance.

10 The City prepared and enacted a second franchise, similar to the first. This also contemplated a sixty cent rate, or even higher. It also provided a pressure below the usual point for inefficiency in cold weather.

11 These movants invoked again the referendum. They had some nine thousand names to the Petition.

12 A conference was then held between these movants, a committee of citizens representing the City officials and the officials of the appellant. Mr. Duncan was one of its Attorneys in the conference. As the result of this conference, a second franchise was repealed, and immediately amended to give the consumers the right to become parties in all proceedings to fix or change rates and to preclude secret conferences and manipulations between the officials of the Gas Company and the City. It was then provided that meetings to discuss rates or changes in rates should be advertised in the official newspaper of the City, for five days before convening. To protect themselves against the inadequate pressure which the City was willing to allow the Company, the following was inserted . . . "*at all times a uniform and adequate pressure at the outlet of each customer's meter.*"

13. That under the Statutes of Kentucky, cities of the second class, which includes the City of Lexington, may be governed by the Commission form of Government, and provides for an initiative and referendum in regard to its legislation. The City of Lexington adopted that form of Government.

14. That by reason of Section 3255 c 1, of the Kentucky Statutes, conferring upon the citizens and voters, the right to subject municipal legislation to a referendum, the citizenship is the real governmental power of such a City and not the official Board of Commissioners. The Citizens of the City of Lexington, acting generally by and through these movants, created for themselves by the aforesaid Section 37, the right to become an actual party in all proceedings to fix gas rates in the City of Lexington, and to participate in all conferences having a fixation or change of rates in contemplation. The participation of the citizens in this movement, said to be made a party in the franchise, was made necessary by the decision of the Kentucky Court of Appeals in *Patton et al. v. Fayette Home Telephone Company*, in 155 Ky. 555, having there decided the parties to a franchise contract can at any time, by agreement, change the provisions thereof.

15. That to prevent the officials of the City of Lexington from changing the franchise and releasing the Company from any provisions in the franchise, that it might desire to be released from, caused the citizens, and particularly these movants to place in said franchise the aforesaid Section 37 to prevent any change in said franchise after its adoption by agreement between the City and the Gas Company alone.

16. That, after the amendment to said franchise, as set forth in Section 12, the same was purchased by the appellant, the Central Kentucky Natural Gas Company. These movants at once filed before the Railroad Commission of Kentucky, a petition to fix a just rate in Lexington.

17. The City of Lexington filed the petition before the Railroad Commission entitled, the City of Lexington and S. B. Featherstone v. Central Kentucky Natural Gas Company.

18 The aforesaid Railroad Commission declined to accept jurisdiction to hear the gas controversy from Lexington. These movants and some four hundred other persons instituted a Mandamus proceeding in the Franklin Circuit Court, requiring it to take jurisdiction and decide the rate controversy. They procured a Mandate from the Franklin Circuit Court. They file herewith, as part of this affidavit, a copy of the said Mandate and make same part hereof, marking same for further identification Exhibit "A".

19 That, thereafter, under the said writ of Mandamus, the said Railroad Commission assumed the jurisdiction of said controversy and called for hearing the various Lexington gas complainants.

20 On the 1st day of February, 1928, by agreement of all the parties in said controversy, the Railroad Commission of Kentucky entered an order directing these movants, as the Plaintiffs in the several proceedings to file their Petition in the action entitled, City of Lexington, *et al* v. Central Kentucky Natural Gas Company, and become parties therein.

21 That these movants appeared at every hearing and participated as actively as the state of the record required them to act in the trial of said rate case.

22 That during the proceeding in the said Railroad Commission, these movants and some 4,000 other persons filed their further motion to distribute all impounded funds by the said Commission.

23 That citizens in the City of Lexington and Gas Consumers thereof, other than these movants, filed their petition before the said Railroad Commission attacking the rate promulgated by the Gas Company, and seeking a reasonable and lower rate from the said commission.

24 That on the 9th day of October, 1929, the aforesaid Railroad Commission awarded to all complainants therein, a flat rate of 45c per M. cu. ft.

25 That thereafter the appellant filed its petition in equity in the District Court of the United States for the Eastern District of Kentucky to enjoin the said rate as confiscatory.

26. That in said proceedings it named as Defendants only the City of Lexington and the aforesaid Feather stone.

27. That it did not implead these movants or any of the said 5,000 other persons who were parties, who had intervened therein.

28. That the order of award of the said Railroad Commission, by its terms was to become final thirty (30) days after same was entered, unless suspended by the proper judicial proceeding.

29. That no injunction was sought or procured against these movants or said persons within the said thirty (30) days, nor at any time thereafter.

30. That these movants did appear in the District Court of the United States, become parties thereto, and participated in all the proceedings in the said Court, as the representatives of themselves and all gas consumers in the City of Lexington under the right conferred upon them by Section 37 of the Franchise Ordinance as written therein at the instance of these movants and the referendum proceedings herein before referred to.

31. That many citizens and gas consumers did not appear in the District Court, but stood upon the award as made by the Railroad Commission, and together with these movants are now undertaking to enforce said award, and to that end have instituted suit in Fayette Circuit Court in addition to the application made to the Railroad Commission for the distribution of the funds impounded therein, based upon its award of 45c.

32. That these movants and these persons will greatly be prejudiced and harmed if the Decree of the District Court of the United States appealed from by the appellant is disturbed or reversed.

33. That these movants and said persons waited until more than ninety (90) days had elapsed after the entry of the decree of the U. S. District Court aforesaid before bringing suit to enforce said award. They did not institute said proceeding until they knew that no appeal was being prosecuted against them and until their Counsel had been advised by the General Counsel of the Gas Company that they did not intend

to implead these movants, but had elected to proceed in this Court without making these movants parties thereto, and that they, as Counsel for the appellants had assumed the responsibility for their said procedure

11. That these movants and other participants in the litigation in the lower Court, and the Railroad Commission were not omitted as appellees by reason of any mistake, accident or oversight on the part of the Company, or its Counsel

12. That on the day of , 1911, a communication was addressed to the said the Company, and its Counsel, by the appellee acting by and thru its Counsel, Robt H. Winn and C. M. Harbison in which communication the attention of the appellant was called to the omission of Appellees from the said record That said communication was sent to Counsel for the appellant which said communication was received by appellant and reads and is in words and figures as follows.

Messrs Henry T. Duncan,
Lexington, Kentucky
D. T. Hazelrigg,
Frankfort, Kentucky

Gentlemen

Mr C. M. Harbison, Corporation Counsel for the City of Lexington, and I as specially employed counsel in the litigation of the Central Kentucky Natural Gas Company about the Lexington gas rates, desire to put ourselves upon record with respect to the following matter

The franchise contract out of which this litigation arises grants the right to any interested gas consumers of Lexington to intervene in this litigation

On September 15, 1911, in Order Book, page 300, of the Railroad Commission of Kentucky, appears this

"This day Grant E. Lally in the name of J. A. Edge and others filed a petition intervening in the above complaint"

In the United States District Court before the three judges on December 5th, 1929, this order was entered:

"On Motion of Mrs. George Higenight, et al, it is now ordered that the petition to be made a party herein tendered November 7, 1929, be and the same is filed and noted of record."

Your client, the Gas Company, is now in process of making up its appeal to the Supreme Court from the decree of the three judge Court. You have not made the parties referred to in the foregoing orders parties upon the appeal. Mr. Harbison and I, of course, have not any right to practice your side of the case, nor to decide for you whether these people are necessary parties upon the appeal. For the protection of the City, however, and its Attorneys, we feel constrained to make a record of the fact through this letter that we have brought the matter to your attention.

Yours very truly,

(Signed) Robert H. Winn
(Signed) Clinton M. Harbison

These movants say that there is now substantially $1,000,000.00 impounded with a designated custodian and that this impoundment arises from the impounding of the per M. cu. ft. from the time the Company ceased to collect 60c and commenced to collect 60c per M. cu. ft.

In addition to the fund arising from the said impoundment, there is in the possession of the said Corporation, a sum of $250,000.00 which it will be required to refund to the consumers if its appeal is dismissed, or the decree appealed from, affirmed. The appellant executed no appeal bond or *supersedeas* to protect these movants in their right to receive from it, the said $250,000.00 or more, of impounded funds, but which under the franchise in the record, it can be required to refund to them if the 45c rate of the Kentucky Railroad Commission is affirmed.

In January, 1932, Clinton M. Harbison, became Corporation Counsel of the City of Lexington, succeeding Wm. H. Townsend. The movants and other citizens of the City of Lexington did not believe that this change in the office of Corporation Counsel, improved in any manner, the conditions between the citizens and the Gas Company. They are informed, and believing their information to be true, say that the said Harbison is now, and was at the time he assumed the office of Corporation Counsel, and several years prior thereto, one of the company of gentlemen engaged in buying gas from the Petroleum Exploration Company, named in appellant's record, paying therefore 7½c per M. cu. ft. and it is the belief of these movants and the citizens generally, that this business connection incapacitated the said Harbison to fairly contend that the Central Kentucky Natural Gas Company should not receive 10c gas in the City of Lexington while his own Company engaged in selling gas for 7½c, and that said connection also incapacitated him from making complaint of the contract by which the Petroleum Exploration Company sold gas to the Central Kentucky Natural Gas Company at 10c per M. cu. ft.

J. W. Hamm,
O. W. Harvey,
J. W. Delaney,
Stanley Deanmoun,
William Deanmoun,
Mrs. George D. Hunnicutt,
Mrs. Anna Mae Hollingsworth.

[Jurat omitted in printing.]